IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1296 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GULBIRSINGH HARBHAJANSINGH AGRAWAL (VIRK)

Versus

LEGAL HEIRS & REP. OF DECD. ANNAPOORNA J PASAWALA

Appearance:

MR MB GANDHI for the Petitioner.

MR RA MISHRA for Respondent No. 1-1/2

CORAM : MR.JUSTICE KUNDAN SINGH

Date of Order: 04/04/2003

ORAL ORDER

This Civil Revision Application has been filed by the petitioner-original defendant against the judgment and decree dated 25.10.2002 in Civil Appeal No. 30 of 1996 passed by the Appellate Bench of Small Cause

Court, Ahmedabad by which the judgment and decree dated 8.12.1995 in H.R.P. Suit no. 1548 of 1987 passed by the Judge, Small Cause Court, Ahmedabad has been set aside to the extent of possession of the suit premises and rest of the judgment and decree of the trial court has been confirmed.

2. It is stated that HRP suit no.1548 of 1987 was filed against the petitioner-defendant-tenant for arrears of rent and eviction on other grounds on 2.5.1987. The arrears of rent were claimed from 1.5.1984 to 28.2.1987 by notice dated 31st March, 1987 which was served on the defendant on 6th April, 1987. The defendant submitted his reply on 30th April, 1987 within 30 days and claimed that the standard rent of the suit premises was Rs. 25/- per month as it was earlier rented to some other person at the rate of Rs. 25/- per month. Though the plaintiff claimed the rent at the rate of Rs. 60/- per month and it is stated that it has not been made known to the plaitniff whether taxes have already been paid by the defendant or not. Hence, the claim was for education cess as well as municipal taxes. The trial court vide its judgment and decree dated 8th December, 1995 held that the plaintiff is not entitled for possession of the suit premises and the defendant was not found to be in arrears of rent and that the defendant had deposited the rent upto 31st December, 1995. There was no specific claim by the plaintiff in respect of the education cess. Hence, half of the education was to be payable by the defendant from 1995-96. The standard rent was also fixed at the rate of Rs. 60/- per month inclusive of municipal taxes and half of the education cess to be payable by the defendant. On an appeal being filed by the plaintiff before the Appellate Bench of Small Cause Court, the Appellate Court vide its judgment and decree dated 25.10.2002 has reversed the judgment of the trial court to the extent of possession of the suit premises and rest of the judgment and decree of the trial court has been confirmed. The respondent-original defendant was directed to hand over the vacant and peaceful possession of the suit premises to the appellant-landlord on or before 31st December, 2002. The Appellate Bench has allowed the appeal mainly on two grounds. That the dispute regard standard rent raised by the tenant was not a bonafide dispute and it was raised only for the sake of raising the same. The second ground is that section 11(3) of the Bombay Rent Act provides an opportunity to the tenant to move an application for standard rent or fixation of interim standard rent. If the tenant fails to do so, the tenant should pay or deposit the agreed rent in absence of fixation of the

standard rent or interim standard rent.

3. From the submissions made on behalf of the parties and on perusal of the relevant record with the assistance of the learned counsel for the parties, it appears that in the present case, there is no pleading on behalf of the plaintiff that the dispute regarding standard rent raised by the defendant was not bonafide or malafide. So far as the first question regarding bonafide dispute of standard rent is concerned, the learned counsel for the petitioner-tenant placed reliance on the judgment of this Court in the case of Valati Lalmohmed vs. Sarfunnissa Abdulmajid and others reported in 1993(1) GLH, 164 in which it is held that in appeal, the Appellate Court decreed the suit for possession and took the view that dispute raised by tenant about the standard rent in his reply to the demand notice was not a bonafide dispute. It was held that in absence of pleading by the landlord to the effect that dispute raised by tenant as regards standard rent was not a bonafide dispute, the Court could not arrive at any finding to that effect. The burden of proof on the point that the dispute raised by the tenant was not bonafide is on the landlord. In the present case, the plaintiff has not proved the fact that the dispute raised by the defendant was malafide or was not bonafide. This matter has already been decided by this Court in the case of Valati Lalmohmed (Supra). Hence, it is a well settled proposition of law that in absence of pleading of the party concerned, the bonafide or malafide dispute regarding standard rent cannot be determined. In the present case, there is no pleading by the plaintiff that the dispute raised by the defendant was not bonafide or was malafide. It is already held by this Court and I am in full agreement with the decision in the case of Valati Lalmohmed (Supra). Unless the defendant has no opportunity to rebut the allegation regarding bonafide or malafide dispute the matter cannot be decided and for that purpose, there must be pleading by the plaintiff and in absence of that pleading, the ground taken by the appellate court for allowing the appeal is not sustainable in the eye of law.

4. So far as the second ground is concerned, the tenant has not moved an application under section 11(3) of the Bombay Rent Act for fixing the standard rent or fixing of interim standard rent. The tenant is required to deposit the entire arrears of rent at the contractual rate. In this regard, the submission of the learned counsel for the petitioner is that in case the tenant deposits the entire arrears of rent at the

contractual rate, without fixing either interim standard or standard rent, the amount already fixed cannot be adjusted in the rent to be paid in future. In support of his argument, he placed reliance on the decision of this Court in the case of Prakash Surya vs. Rasiklal Ishverlal Mehta reported in 1977 (18) GLR, 1024 wherein it has been held as under:

" Law dos not permit the tenant to lay upon the settled account and asking for adjustment for entire period. When he paid that amount month to month, he merely carried out his obligation under the contract simultaneously enjoying the benefit of continued occupation of the premises. Law permits modification of the terms of the contract where rent claimed by the contract is in excess of the standard rent, by the court determining the standard rent and the Courts order would itself pro tanto modify the contract. The Court's order would be prospective. At any rate, there is nothing to show that it can retrospectively reopen the past-payment. There is nothing making it retrospective in the order fixing the standard rent. Any recovery of rent to be made after the determination of the standard rent will have to be according to the standard rent, but any amount paid, accepted and acknowledged as receipt of rent cannot be claimed back unless it falls within the court corners of section 20 and if a payment is made which when made was obligatory and was legal, it can hardly be construed to say that it also showed readiness and willingness to pay the rent for a future period for which the rent was not paid. "

In that regard, the learned counsel for the respondents contended that it is obligatory on the part of the tenant to move an application under section 11(3) of the Act to get the standard rent fixed or at least interim standard rent. If the tenant has not moved the application for that purpose, then the Court will drawn an inference that the tenant is not willing and ready to pay the amount of rent as per the provisions of law. In support of his argument, he relied on the decision of this Court in the case of Harilal Gordhanbhai vs. Ramniklal D.Ratneshwar reported in 1996(1) GCD,1 wherein the learned Single Judge of this Court has construed as under:

"The object and the underlying scheme of the provisions of sections 11 and 12 of the Rent Act is to provide umbrella to the tenant against eviction so long as the tenant pays or is ready

and willing to pay the standard rent and permitted increased. Section 12 places restriction on the free and unfettered right of the landlord to seek eviction on the ground of non-payment of rent from the tenant during the period the Act remains in force. A tenant who pays and who is ready and willing to pay standard rent and permitted increases is protected from eviction. Section 12 (1) thus provides statutory protection to the tenant so long as the tenant pays and is ready and willing to pay standard rent and permitted increases and observes the terms of his tenancy. Section 12(2) entitles further protection that a landlord cannot file a suit for eviction unless he has made a demand in notice in writing of the arrears of standard rent or permitted increases. As soon as the tenant receives notice of demand he has either to pay the same within one month or if he raises a dispute with regard to standard rent or permitted increases, he has to file an application for fixation of standard rent or permitted increases, as the case may be within a period of one month in light of provisions of section 11(3). Failure to do so would obviously disentitle the tenant to protection and will entitle the landlord to eviction decree under section 12(3)(a) or 12(3)(b) as the case may be. If the tenant makes an application under section11(3) and if such application is dismissed for non-prosecution or default without payment of rent as per the demand in the notice under section12(2) and does not get it restored or reviewed, the tenant cannot be said to be ready and willing to pay the rent. It cannot also be said that there is dispute of standard rent once an application for fixation of standard rent under section 11(3) is dismissed for default. Therefore, the first safeguard under section 12(1) is lost."

In this respect, the learned counsel for the petitioner has also contended that the learned Single Judge has not considered the decision of the Full Bench of this Court in the case of Ramniklal Dwarkadas Modi vs. Mohanlal Laxmichand and others reported in 1977(18) GLR, 32 wherein it has been held as under:

"11. We completely agree with the position of law on the point in issue enunciated in Ambalal's case and the reasons of our agreement are as set out in the said judgment and it is not necessary

to repeat the same. To summarise the correct proposition of law on the point in issue:

(a) If the tenant files an application to the Court under section 11(3) of the Act within the period of one month of the receipt of the notice referred to in section 12(2) of the Act, he shall be deemed to be ready and willing to pay the rent and permitted increases specified in the order made by the Court as per provisions of section 12 read with the Explanation.

(b) The tenant can also establish his readiness and willingness to pay the rent due by any other mode than the one indicated in the Explanation read with section 12 of the Act, as for example, by tendering the demanded amount of rent in cash within one month of the receipt of the notice referred to in section 12(2) of the Act. This illustration regarding payment in cash is merely illustrative and not exhaustive.

(c) The tenant can also claim protection from the operation of section 12(3)(a) of the Act by raising a dispute as to the standard rent either prior to the notice under section 12(2) of the Act or by reply to the notice but in this case the tenant must do so within one month from the receipt of the notice referred to in section 12(2) of the Act.

The protection obtainable as per points(b) and (c) set out hereinbefore is further protection to which the tenant is entitled and is independent of each other as well as what is said in point (a). It is not a further requirement for such protections that the tenant must make an application under section 11(3) of the Act. It may be clarified that the word "next" used in section 12(2) means immediately so that the tenant has to raise a dispute regarding the standard rent within one month of there receipt of the notice referred to in section 12(2) of the Act."

5. Thus, the Full Bench of this Court has decided that the tenant can claim the protection from the operation of section 12(3)(a) of the Act by raising a dispute as to the standard rent either prior to the notice under section 12(2) of the Act or reply to the notice. That must be raised within one month from the receipt of the notice served under section 12(2) of the Act. In the present case, it is undisputed that the defendant has raised the dispute regarding standard rent

within one month of the notice and it is also undisputed that he also raised this question in the written statement also. The trial court has also framed an issue in that respect and has decided that dispute regarding standard rent at the final stage of the suit. As such, it cannot be said that the defendant was not willing or ready to be continued the tenant and pay the rent. In the present case, it is also undisputed that on the date of framing of issues i.e. the first date of hearing, the defendant has already deposited the amount of Rs. 4080/vide pursis exh. 26, though, according to the defendant, the standard rent has been deposited and though at the contractual rate, the defendant was required to deposit Rs. 6300/-. The defendant had already deposited more than the amount of standard rent as per his say. It cannot be said that the defendant was in arrears of rent and he had not complied with the requisite provisions of law. As already discussed earlier, the Full Bench of this Court has decided that readiness and willingness to pay will be inferred if he raises the dispute regarding standard rent and that if the standard rent or interim standard rent has not been deposited within time fixed by the court or on the first date of hearing. In the present case, on the first day of hearing, the standard rent was not fixed nor interim standard rent was fixed. Hence, as per the calculation of the defendant himself, more than standard rent amount was already deposited prior to the first date of hearing. This type of arrangement has been made by the Full Bench which is binding on the learned Single Judge of this Court. Therefore, I hold that requisite protection was available even if the defendant had not moved an application for fixing the standard rent as Full Bench has held that mere raising of the dispute regarding standard would be sufficient for protection of section 12(3)(b) of the Act. As such, this ground taken by the lower appellate court for setting aside the decree of the trial court is also not sustainable in the eye of law.

6. In view of the above discussion and well settled position of law, this Civil Revision Application requires to be allowed. Accordingly, the Revision Application is allowed. The judgment and decree dated 25th October, 2002 in Civil Appeal No. 30 of 1996 passed by the Appellate Bench of Small Cause Court, Ahmedabad is hereby set aside. No order as to costs. Notice is discharged and the interim order, if any, stands vacated.

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